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In the Supreme Court of the United States

OCTOBER TERM, 1989

KEITH L. CLINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a member of the United States Air Force Reserves who was ordered into active duty, was on active duty status when he distributed narcotics.

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OPINIONS BELOW

The opinion of the Air Force Court of Military Review (Pet. App. 10a-14a) is reported at 26 M.J. 1005. The opinion of the Court of Military Appeals (Pet. App. 1a-9a) is reported at 29 M.J. 83.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 28, 1989. The petition for a writ of certiorari was filed on November 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Following a special court-martial at Norton Air Force Base in California, petitioner, a member of the United States

Air Force Reserves, was convicted of the distribution of marijuana. The court-martial sentenced petitioner to a bad conduct discharge and a reduction in rank to the lowest enlisted grade. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and the sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. On January 16, 1985, petitioner reenlisted in the Air Force Reserves for a period of eight years. For his reserve duty he was assigned to Norton Air Force Base, where he also worked full-time as a civilian employee of the Air Force. Tr. 19, 38; AX 9. On March 9, 1987, petitioner received a written order to perform annual active duty training for a period of 15 days.[1] His active duty training period was to begin on April 25 and end on May 9. Tr. 21; AX 11. The written order indicated that petitioner was to report for duty at 5 a.m. on April 25. AX 11. Petitioner attended a predeployment briefing on April 5. At the briefing, he was told to report for duty at 4 p.m. on April 25th, and he was advised that he would be subject to the Uniform Code of Military Justice beginning at one minute past midnight that day. Hearing Tr. 57, 61-62.[2]

On April 24, petitioner agreed to provide some marijuana to a military member, Senior Airman Albert Hodgson, who was in petitioner's squadron. Hodgson gave petitioner $25 for the marijuana and was to call petitioner at his home that evening to make arrangements to receive the marijuana. Tr. 69-71. Petitioner and Hodgson subsequently agreed that

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[1] Members of a reserve component are required annually to perform a minimum of 14 days of active duty training, exclusive of travel time. 10 U.S.C. 270(a); 32 C.F.R. 101.5(a).

[2] After the court-martial adjourned, an additional hearing was held to develop evidence on the jurisdictional issue. References to that evidentiary hearing are cited as "Hearing Tr."

Hodgson would pick up the marijuana at petitioner's house on the morning of April 25. Unbeknownst to petitioner, Hodgson was assisting the Air Force Office of Special Investigations (OSI) at the time. Tr. 39. Before meeting petitioner, Hodgson and his car were searched by OSI agents, who also followed Hodgson to petitioner's house and saw the transaction take place in petitioner's yard at 8:30 a.m. on April 25. Tr. 40-41, 47, 75, 78; Pet. App. 11a.

Petitioner left his house at approximately 3:35 p.m. that day to report for his active duty tour. Hearing Tr. 69. When he returned from his overseas assignment on May 9, petitioner was apprehended by the OSI at the Norton Air Force Base passenger terminal. Tr. 16. An order was prepared continuing petitioner on active duty status pending the outcome of disciplinary proceedings against him. AX 12.

2. At trial and on appeal, petitioner argued that he was not subject to the Uniform Code of Military Justice at the time of the offense since he had not yet commenced traveling to his unit for active duty training. The trial judge rejected that claim, and the Air Force Court of Military Review affirmed on the ground that the order calling petitioner into active duty specified that it would take effect at 12:01 a.m. on April 25, 1987. Pet. App. 10a-14a. The court reasoned that the date specified in the order, rather than the time that petitioner actually left for his duty station, was dispositive, because the latter was an administrative decision made by petitioner's unit commander based upon the unit's needs. While in active duty status, the court held, petitioner was subject to the Uniform Code of Military Justice. *Ibid.*

3. The Court of Military Appeals affirmed. Pet. App. 1a-9a. The court noted that Article 2(a)(1) of the UCMJ, 10 U.S.C. 802(a)(1), confers jurisdiction over different categories of persons at different times. Volunteers are subject to the UCMJ "from the time of their muster or ac-

ceptance into the armed forces." Inductees are subject to the UCMJ "from the time of their actual induction into the armed forces." "[O]ther persons" who are lawfully called into active duty are subject to the UCMJ "from the dates when they are required by the terms of the call or order to obey it." Since petitioner fell into the last category, the court found that he was subject to the UCMJ beginning immediately after midnight on the effective date of his order to report for active duty. Pet. App. 5a-9a.

ARGUMENT

Petitioner contends that he was not subject to the Uniform Code of Military Justice when he distributed marijuana to Airman Hodgson. Petitioner's claim, however, is quite narrow. He does not argue that Congress lacks the power to apply the UCMJ to reservists while they serve the active duty component of their reserve obligation. Instead, he maintains that he was not in fact on active duty at the time in question, because he had not yet left to join his unit. That fact-bound question, which has no application beyond the military justice system, does not warrant review by this Court.

Petitioner claims that the distinction drawn by the text of Article 2(a)(1) of the UCMJ, 10 U.S.C. 802(a)(1), between persons who are deemed members of the armed forces "from the time of their muster or acceptance into the armed forces" and "from the dates when they are required by the terms of the call or order" into active duty is a distinction of no moment.[3] His position, however, is inconsistent

[3] Article 2(a)(1), 10 U.S.C. 802(a)(1), states:

> The following persons are subject to this chapter:
>
> (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster

with the clear language that Congress used in Article 2(a)(1) and is also illogical.

Congress used different terms in Article 2(a)(1) to describe the different points at which a person becomes a member of the armed forces. Volunteers and inductees are civilians and do not become members of the armed forces until they take the oath of induction. See *In re Grimley*, 137 U.S. 147, 156-157 (1890) (a person who has enlisted in the armed forces changes his status from civilian to serviceman by taking the oath of allegiance). Reserve members, on the other hand, are by statute members of a military component, 10 U.S.C. 261(a)(6), and can be called into active duty from their reserve status by military order if the need for additional military units arises, see 10 U.S.C. 262.[4] Therefore, the terms Congress used in Article 2(a)(1) recognize the different status enjoyed by persons in these three categories and gives effect to each one: Volunteers and inductees are not subject to the UCMJ until they officially enter the military, while reservists are subject to the UCMJ from the moment they are called into active duty status; once they are in that status, reservists can be called upon to perform such duties as military needs dictate. For that reason,

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or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

[4] 10 U.S.C. 262 states that "[t]he purpose of each reserve component is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency and at such other times as the national security requires, to fill the needs of the armed forces whenever, during, and after the period needed to procure and train additional units and qualified persons to achieve the planned mobilization, more units and persons are needed than are in the regular components."

the UCMJ can properly be applied to such reservists just as it can be applied to members of the regular components of the armed forces.

Petitioner's interpretation of Article 2(a)(1) is also illogical. Under petitioner's construction of the UCMJ, reserve members could forever avoid military jurisdiction simply by ignoring an order to report for active duty. The distinction in Article 2(a)(1) between volunteers, inductees, and other persons called into duty is therefore eminently sensible. Contrary to petitioner's contention, there is a good reason to distinguish between the phrases "from the time of" and "from the dates when," as they are used in Article 2(a)(1).

Petitioner relies heavily on legislative history of Article 2(a)(1) to support his reading of its text. In particular, he invokes one passage from testimony given by Felix Larkin, Assistant General Counsel of the Department of Defense and Executive Secretary to the Department of Defense Committee on the Uniform Code of Military Justice, before a subcommittee of the House Committee on Armed Services during hearings held in 1949 on revisions to the UCMJ. Pet. 4. Mr. Larkin's view of the relevant portion of Article 2(a)(1) was that "I think the construction there would be when they actually report for duty or perhaps when they leave home on their way to report for duty." Pet. 4. Aside from the fact that the foregoing comment was directed to an earlier version of Article 2 that did not become the law, Pet. App. 7a, Mr. Larkin's tentative views on the proper construction of Article 2(a)(1) do not supply "the most extraordinary showing of contrary intentions" necessary to "justify a limitation on the 'plain meaning' of the statutory language." *Garcia* v. *United States*, 469 U.S. 70, 75 (1984). If Congress intended that the phrase "from the dates when" would mean the same as the phrase "from the time of," Congress would have used that clear and specific language. After

all, the two phrases are used in the same sentence. The fact that Congress chose to use two different phrases suggests that they do not have the same meaning. See *Chan* v. *Korean Air Lines, Ltd.*, 109 S. Ct. 1676, 1683 (1989) ("When such an interpretation is allowed, the art of draftsmanship will have become obsolete.").

Petitioner also errs in claiming that certain other statutes, regulations, and court decisions support his construction of Article 2(a)(1). Pet. 5. As the Court of Military Appeals explained, Pet. App. 8a-9a, those statutes, regulations, and decisions involve various administrative determinations, such as travel allowances and death benefits, that are not designed to define military criminal jurisdiction. The Court of Military Appeals, whose interpretation of the UCMJ is entitled to considerable deference, *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976); *Hiatt* v. *Brown*, 339 U.S. 103, 109 (1950), properly refused to apply petitioner's "strained extrapolation" from the cited laws and regulations to the statute at issue here. Pet. App. 9a.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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